

November 18, 2005

submitted electronically: mgal461@ecy.wa.gov and via US Mail

Mike Gallagher, PBT Coordinator
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504

RE: Proposed Rules – Chapter 173-333 WAC Persistent Bioaccumulative Toxins (PBTs)

Dear Mike:

NWPPA appreciates the opportunity to comment on the Department of Ecology's proposed rules, Chapter 173-333 WAC, to address persistent bioaccumulative compounds (PBTs). This is Ecology's second set of proposed rules and NWPPA's second set of comments¹.

The pulp and paper industry was represented on Ecology's PBT Advisory Committee by Dr. Jeff Louch, NCASI. NWPPA served as NCASI's alternate on the advisory committee. NWPPA supports and incorporates by reference comments prepared by NCASI. NWPPA and NCASI both worked with the Association of Washington Business (AWB) to incorporate our concerns in the form of recommended language for the proposed rules. NWPPA determined that it would be preferable to have recommended language from the various business sectors submitted by AWB to avoid duplication and possible unintended conflicts.

NWPPA strongly supports the AWB recommendations, and urges Ecology to incorporate these revisions. NWPPA offers a few comments in the spirit of supporting rationale.

Throughout this process, NWPPA sought to promote the following concepts:

- 1. PBT decisions, including the first "starter list," should be based on credible science, not ad hoc politics. Chemicals recently added reflect ad hoc considerations, not scientific rigor, and should be deleted.**

¹ Ecology published the first draft PBT rule in the Washington State Register (WSR 5-11-095) (the June 1st draft). Ecology made substantial revisions to the proposed rule, consequently Ecology re-proposed the rules (September 2nd draft) and offered the opportunity to comment.

RE: WAC 173-333-310

The most important objective of the proposed rules is to provide a clear, predictable and scientifically driven process to identify and list PBTs. To the greatest extent possible, credible science should drive Ecology decisions as to which of the listed chemicals warrant Chemical Action Plans. The alternative is the undesirable reality, already unfolding in Washington, whereby various interest groups seek ad hoc Executive Orders or legislative directives regarding the “chemical of the day.”

As a policy matter, NWPPA advocates that the role of science in the listing process cannot be over emphasized. The listing decisions lend themselves to evaluation of objective science in a systematic manner. NWPPA recognizes that the decisions as to whether CAPs are needed, while still based on credible science, are inherently more subjective and will likely involve policy considerations.

It is extremely important that the first “starter list,” proposed in WAC 173-333-310, be a scrupulous representation of the application of the P, B, T criteria. By P, B, T criteria, NWPPA refers not only to the numeric criteria, but the issue of how Ecology views credible science (see comment 2).

NWPPA strongly urges the deletion of Di-isodecyl phthalate (DIPP), Di-n-hexyl phthalate (DnHP) and nonylphenol as per NCASI comments. NWPPA also endorses AWB comments with respect to metals and other chemicals that should be removed from the list.

The very first list should not start out as a compromise of the P, B and T criteria. Concern over ad hoc decision-making drove the need for the rule in the first place.

- 2. Application of the PBT criteria should have two distinct levels of analysis: (a) whether the numeric criteria are satisfied; and (b) whether the weight of the scientific evidence is adequate.**

RE: WAC 173-333-320

As currently written, the proposed rules specify numeric criteria for P, B, or T, but do not contain any provision for dealing with the weight of the scientific evidence. Under the rules as proposed, a chemical could be listed as a PBT based solely on one scientific study, even if that study produced findings that differed from the majority of findings regarding that chemical. Also, rules could lead to a result whereby a chemical could be listed solely based on modeling.

As a consequence, Ecology rules would result in a bias against predominant scientific findings and towards listing chemicals that, in fact, might not truly be PBTs. This will lead to an overly broad list and negative public perception that may be misdirected.

NWPPA recognizes that it may be difficult for Ecology to exclude scientific studies that depart from the predominant science for a particular chemical. However, Ecology should evaluate the reasons that a particular study departs. There could be many reasons. The scientist may have been investigating another issue and offered speculation regarding a particular chemical. The scientist might have extrapolated from existing valid data sets, but extrapolated into a range outside of the data set. These and other scenarios are surprisingly common, but are in effect, opinions.

As a strongly recommended solution, NCASI comments support an approach whereby the rules would specify that Ecology consider *all* available credible science, but will evaluate a chemical against the numeric criteria base on a mean or median; if that is not practicable, then Ecology will look at the weight of scientific information. Actual experimental data would be given greater weight than data derived from modeling efforts. Furthermore, if possible, in its technical memorandum supporting listing decisions, Ecology should include an analysis of the reasons a particular study departs from the predominant findings.

NWPPA believes this would be the least burdensome approach to Ecology, and helps avert debate over whether a particular study should be excluded.

3. The rules should reinstate a ranking system for chemicals that have been determined to meet the PBT criteria. This is needed as part of a clear and transparent process to determine if CAPs are needed.

RE: WAC 173-333-410

NWPPA was very disappointed that Ecology has revised the process for selecting chemicals from the PBT List for development of chemical action plans by eliminating the three list categories originally in the June 1st version of WAC 173-333-410(2). The three categories were:

- Category 1: PBTs actually used, released or present in Washington;
- Category 2: PBTs for which there are insufficient information on use, release or presence; and
- Category 3: Those for which there are no other laws or are addressed by other laws.

In its July 22, 2005 comments, NWPPA supported the three-category scheme.

Throughout the advisory committee process and in comment to the June 1st proposal, both NCASI and NWPPA strongly advocated for the need for a relative ranking system for listed chemicals. With respect to PBTs, relative ranking is perhaps the most important policy decision Ecology can make. In the PBT advisory committee process, NWPPA recognized practical issues and supported the briefer categorization system in lieu of an articulation in the rules regarding relative ranking would be performed.

Some reviewers of the June 1st proposal found even this simple categorization system too complex. In response, Ecology has substituted vague language regarding relative ranking and a multi-year schedule, perhaps to be supplemented with additional guidance on selection factors.²

NWPPA's first preference remains that Ecology rules have a strong clear articulation of how it plans to conduct relative ranking. For the purposes of this rule, NWPPA can support the multi-year schedule concept, provided Ecology include in the proposed rules language that reflect "high, medium and low" priorities, as per the AWB language. The "high, medium and low" categories should incorporate the concepts of the original three-category system.

NWPPA continues to express the view that Ecology's decisions as to whether CAPs are needed should be based on credible science and relative ranking of risk. These determinations should be clear, prior to undertaking the CAP itself. The CAP process should not become the mechanism for determining if a CAP is needed.

4. The rules should be viewed as a supplement to Washington's existing regulatory regime and narrowly focus on PBT issues that result from gaps; the PBT program should not be an over-arching umbrella program.

WAC 173-333-100

The concept of the PBT rules as supplementary to, and designed to enhance, actions taken under other programs is reflected in the introductory section of the proposed rules and was robustly discussed in the advisory committee process. NWPPA continues to endorse this approach.

It will be important for Ecology to continuously re-affirm the purposes and philosophy expressed in the rule as it administers the PBT Program into the future.

Thank you for your consideration of these comments.

Sincerely,

Llewellyn Matthews
Executive Director

LM:sd

cc: Grant Nelson, AWB

² "Summary of Ecology's Review and Initial Response to Public Comments on Proposed PBT Rule," September 2005, at page 5.

Jeff Louch, NCASI